87-1551

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,

Petitioner,

v.

CENTURY COMMUNICATIONS CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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March 10, 1988

QUESTIONS PRESENTED

The resolution of this case will determine whether the American public will continue to enjoy unobstructed access to diverse, competitive local television broadcasts, or whether the public's television viewing alternatives will instead be controlled by the single, monopoly cable television system operator in the community.

The questions presented are:

1. Whether the court of appeals erred in holding that the FCC's must-carry rules, which required cable television systems which have larger channel capacities and which serve as gatekeepers for their subscribers' viewing of television broadcast signals to carry minimum numbers of qualifying local television broadcast stations, were invalid under the First Amendment on the ground that the rules did not reflect an important and substantial governmental interest despite several acts of Congress and numerous decisions of this Court which have found that FCC regulation of cable carriage of local television broadcast signals, including the kind of mandatory-carriage rules in question here, was statutorily authorized and served the substantial governmental interest in preserving the system of free, local broadcast stations.

2. Whether the court of appeals incorrectly applied the First Amendment test in *United States v. O'Brien*, 391 U.S. 367 (1968), by requiring the Commission to prove affirmatively by substantial evidence that cable systems in the future would refuse to carry local broadcast signals to the detriment of local broadcasting absent the must-carry rules.

3. Whether the court of appeals erred by requiring the FCC to adduce "substantial evidence" in the record to support its findings in an informal rulemaking proceeding and by failing to defer to the expert predictive judgments of the FCC based on the evidence in the record.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties in the proceedings before the court of appeals: United States of America, Federal Communications Commission, Richard S. Leghorn, Hubbard Broadcasting, Inc., Chasco Cablevision, Ltd., Clearview Cablevision Associates II, Columbia Associates, L.P., Daniels & Associates, Inc., Landmark Cablevision Associates, Monmouth Cablevision Associates, Masada Communications, Inc., National Cablesystems, Inc., OCB Cablevision, Inc., Ocean Associates, Riverview Cablevision Associates, St. Charles CATV, Inc., United Cable Television Corp., Office of Communication of the United Church of Christ, Spanish International Communications Corp., Univision, Inc., The National Association of Broadcasters, Lincoln Broadcasting Co., National Cable Television Association, *et al.*, Corporation for Public Broadcasting, National Association of Public Television, Public Broadcasting Service, and National Broadcasting Co., Inc.

Petitioner Association of Independent Television Stations, Inc. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1 of this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Association of Independent Television Stations, Inc. ("INTV"), by its attorneys, hereby petitions for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals, dated December 11, 1987, is reported at 835 F.2d 292 and reprinted in the Joint Appendix ("Jt. App.") at 1a-28a. On January 29, 1988 the court issued a clarifying *Order*, which has not been reported and which is reprinted in the Joint Appendix at 29a-31a. The *Report and Order* of the Federal Communications Commission ("FCC" or "Commission") which adopted the regulations at issue is reported at 1 FCC Rcd 864 and reprinted in the Joint Appendix at 32a-204a. The Commission's decision on reconsideration of the *Report and Order* is reported at 2 FCC Rcd 3593 and reprinted in the Joint Appendix at 205a-330a.

JURISDICTION

The judgment of the court of appeals, reprinted in the Joint Appendix at 331a-32a, was entered on December 11, 1987. No party filed a petition for rehearing of the court's opinion and the mandate issued on February 9, 1988. Several parties jointly filed a motion to stay the mandate on February 9, 1988, and the court issued an *Order* recalling the mandate on February 22, 1988. On February 23, 1988, several parties jointly filed a petition for rehearing of the court's *Order* clarifying its opinion. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The following constitutional provisions, statutes and agency regulations have been reprinted in the Joint Appendix or in the Appendix ("App.") attached to the instant petition: (i) the First Amendment to the Constitution of the United States (App., A1); (ii) Sections 1, 303(g)-(h) & (s), and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 303(g)-(h) & (s), 307(b) (App., A1-2); (iii) Section 111 of the Copyright Revision Act of 1976, 17 U.S.C. § 111 (App., A2-19); (iv) Section 624 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 544 (App., A19-21); and (v) the regulations of the Commission which were at issue below, 47 C.F.R. §§ 76.5, 76.51-76.70 (Jt. App., 177a-87a, as modified at Jt. App., 313a-32a).

STATEMENT OF THE CASE

The Commission licenses television broadcast stations to use radio frequencies to serve the public interest by providing advertiser-supported or public-supported "free" television services to local communities. Most communities are served by several competing local commercial television stations, including stations affiliated with the three television broadcast networks (ABC, CBS and NBC) and one or more independent stations,[1] as well as by non-commercial educational stations.

Cable systems use coaxial cable to retransmit to their subscribers the signals of local television stations and other television program services which are not available to local viewers over the air. The non-local programming offered by cable systems consists primarily of the signals of distant television broadcast stations and other specialized program services. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S.

[1] Petitioner INTV is an association of independent television stations, many of which are new, financially struggling UHF stations.

691, 700-01 (1984) ("*Crisp*"). Cable television systems use FCC-assigned radio spectrum to receive program transmissions via satellite circuits and to relay signals via microwave frequencies.[2] Nevertheless, the systems themselves are not licensed by the Commission and are not subject to public interest program obligations as are broadcasters.

The coaxial cable interfaces with a subscriber's television set at the VHF antenna input. Because a subscriber's VHF antenna must be disconnected from the receiver in order to accommodate the cable input, and because cable provides clear signal reception, most television viewers dismantle their external antennas and rely entirely on the cable system to receive local television broadcast signals. (Jt. App., 98a-99a.) In addition, many apartment and other multi-family dwellings employ a "master" cable input in lieu of an outdoor antenna, making cable the only practicable means of access to local broadcast signals. The cable system thereby becomes the "gatekeeper" determining which television stations and other program services gain access to the homes of cable subscribers.[3]

The Commission first asserted jurisdiction over cable television (or "CATV") in the early 1960s because cable is a "closed" transmission medium which exploits and at the same time supplants over-the-air television reception. The Commission grounded its regulation of cable in its statutory duty to make broadcasting available "to all the

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[2] *See generally* 47 C.F.R. Part 78 (Cable Television Relay Service).

[3] Cable television has developed as a *de facto* intra-modal monopoly service. At present, fewer than one percent of the nation's cable systems experience competition from another cable system. *See Communications Daily*, Aug. 21, 1986 at 2; *see also* CATV, 20 F.C.C.2d 201, 222 n.27 (1969), *quoted in* Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 n.81 (D.C.Cir.), *cert. denied*, 434 U.S. 829 (1977) ("cable television's operations have developed on a noncompetitive, monopolistic basis in the particular areas served, with no instance, to our knowledge where a member of the public subscribes to more than one cable television service").

people of the United States," 47 U.S.C. § 151 (App., A1), to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g) (App., A1-2), to "establish areas or zones to be served by any station," 47 U.S.C. § 303(h) (App., A2), and to "make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same," 47 U.S.C. § 307(b) (App., A2).

The Commission's commitment to a policy of maximization and localism of broadcast service is reflected in the television channel allocations which the Commission made in 1952 to "approximate the mathematical optimum" of television broadcast channels in communities throughout the nation. *Television Assignments*, 41 F.C.C. 148, 152 (1952). The Commission declared that "as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs." *Id.* at 172. Congress expressly endorsed the Commission's policy when it enacted the All-Channel Television Receiver Act of 1962.[4] Congress declared that "[t]he goal which is being sought is a television system which will serve all the people, encourage local outlets, foster competition—particularly in larger markets—and meet educational needs."[5]

To assure the integrity and fulfillment of its local broadcast channel allocation policy, the Commission first adopted regulations requiring cable systems to carry the signals of local television stations (hereinafter "must-carry rules") in 1965 and 1966. The Commission found that "the CATV system which fails to carry the local station on its system has in practical effect cut off the station from access to

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[4] Public Law No. 87-529, 76 Stat. 150 (1962), *codified as amended at* 47 U.S.C. § 303(s) (App., A2).

[5] H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962).

CATV subscribers."[6] Because such a denial of access would threaten the economic foundation of over-the-air broadcasting, the Commission held that permitting cable systems to exclude local broadcast signals was inimical to the Commission's statutory mandate to foster the general public's access to local television broadcast services.[7] The Commission concluded that it would be "[in]compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services."[8]

This Court upheld the Commission's statutory authority to regulate cable television in 1968. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) ("*Southwestern*"). Later the same year, the United States Court of Appeals for the Eighth Circuit expressly upheld the constitutionality of the must-carry rules under the First Amendment. *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968) ("*Black Hills*"). Moreover, while the must-carry rules were in effect, Congress and the Commission adopted several measures designed to assist the development of the cable television industry. Among others, Congress created a compulsory copyright license in 1976 to permit cable systems to retransmit local television broadcast signals free of charge and to retransmit the signals of distant stations upon payment of a fixed royalty to the United States Copyright Office. 17 U.S.C. § 111 (App., A2-19). In 1980 the Commission permitted cable systems to import an unlimited number of distant television signals.[9] Four years

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[6] CATV, 2 F.C.C.2d 725, 736 (1966), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968).

[7] CATV First Report and Order, 38 F.C.C. 683, 702-03 (1965).

[8] *Id.* at 699.

[9] CATV Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom.* Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir.

later Congress enacted the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*, which bestowed various privileges and protections upon cable operators while at the same time largely deregulating cable systems.[10] The 1984 Cable Act shielded cable systems from governmental "requirements regarding the provision or content of cable services" except as provided under the Act,[11] but it expressly retained the Commission's must-carry rules.[12]

In *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986) ("*Quincy*"), the U.S. Court of Appeals for the District of Columbia Circuit struck down 20 years of must-carry regulation as violating the First Amendment rights of cable operators. The court rejected the Eighth Circuit's earlier affirmance of the rules under the First Amendment and distinguished this Court's prior statements approving the rules and the substantial governmental interest they promoted. Addressing at length the question of what First Amendment standard governs cable television, 768 F.2d at 1447-54, the court strongly suggested that the most appropriate degree of protection is that accorded to the editorial discretion of newspapers under *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) ("*Miami Herald*").

1981), *cert. denied sub nom.* National Football League v. FCC, 454 U.S. 1143 (1982).

[10] *E.g.*, 47 U.S.C. § 533 (protecting incumbent cable operators from competition from telephone companies and others); §§ 543, 544 (generally prohibiting regulation of cable rates and services); § 546 (requiring renewal of cable franchises unless local communities undertake complex administrative proceedings).

[11] 47 U.S.C. § 544(f) (App., A21).

[12] 47 U.S.C. § 544(f)(2)(A) (App., A21). *See* S. Rep. No. 67, 98th Cong., 1st Sess. 11-12 (1983); H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984).

Despite its inclination to apply the *Miami Herald* standard, the court rejected the Commission's must-carry rules by purporting to measure them against the First Amendment standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*"), for content-neutral regulations imposing incidental burdens on speech. The court held that *O'Brien* subjected the Commission to a "heavy burden of justification" for its predictive judgment that such rules were necessary to prevent a harmful diminution of local television service to the general public. 768 F.2d at 1462. The court then struck down the must-carry rules on the ground that the Commission had failed to prove that the rules reflected a "substantial or important governmental interest." *Id.* at 1454-59.

The *Quincy* court also held that the must-carry rules did not pass muster under the fourth requirement of the *O'Brien* test, 391 U.S. at 377, that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the [substantial government] interest." 768 F.2d at 1459-62. The court held that the rules were "'grossly' overinclusive" because they "indiscriminately sweep into their protective ambit each and every broadcaster, whether or not that protection in fact serves the asserted interest of assuring an adequate amount of local broadcasting in the community." *Id.* at 1460, 1463. The *Quincy* court attached particular importance to the view that "an inexpensive switch (the 'A/B switch') would enable a viewer to alternate between cable and off-air VHF signals," thereby permitting "a cable subscriber with little or no effort [to] view local broadcasts even without the benefit of the must-carry rules." *Id.* at 1441, 1457 n.48.

Several broadcast station licensees and associations petitioned this Court for a writ of certiorari to review the *Quincy* decision. Choosing not to file such a petition, the Commission—in response to the invitation of the court of appeals, to rulemaking petitions filed by commercial and

public television interests, and to a request by several congressional leaders[13]—instead instituted a proceeding in November, 1985 to consider adopting modified must-carry rules. Thereupon the Commission and the Solicitor General advised this Court that they viewed the new must-carry proceeding as obviating grant of certiorari in *Quincy*,[14] and the Court later denied the outstanding certiorari petitions, 476 U.S. 1169 (1986). That denial came one week after the Court, in another case involving the issue of cable television's First Amendment rights, declined to express any "detailed views on the proper resolution of the First Amendment question" and remanded the case to the trial court for "a fuller development of the disputed issues in the case." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986).

On August 7, 1986, the Commission adopted new, temporary and more narrowly drawn must-carry rules and "consumer education" requirements for larger cable systems. (Jt. App., 32a-204a.) The new must-carry rules were largely modeled upon a "joint industry agreement" (*see* Jt. App., 48a) submitted by the principal associations of the cable and broadcast television industries. Both the industry agreement and the Commission's rules generally provided that: (1) the rules would apply only to cable systems with 21 or more usable activated channels;[15] (2) those cable systems would be required to devote no more than 25 percent of such usable channels to carriage of local television broadcast signals;[16] (3) that in order to qualify

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[13] *E.g.*, Letter from Senator Barry Goldwater, Chairman, Senate Telecommunications Subcommittee, to FCC Chairman Mark S. Fowler, dated Sept. 13, 1985.

[14] Memorandum for the Federal Respondents in *National Association of Broadcasters v. Quincy Cable TV, Inc.*, No. 85-502, filed Nov. 21, 1985 (S. Ct.).

[15] 47 C.F.R. § 76.56(a) (Jt. App., 180a).

[16] *Id.* An exception to the 25 percent limit was that cable systems

for carriage, a television station would have to be licensed to a community within 50 miles of the cable system,[17] it would have to deliver a "high quality" signal to the system,[18] and, if it were a commercial station, it would have to demonstrate a significant level of viewership in non-cable households in the county served by the cable system.[19] Even qualifying commercial stations would not be guaranteed carriage by the cable system, since the choice of commercial stations to be included in the 25%-of-channel-capacity "quota" would remain in the sole discretion of the cable system operator.[20]

Several elements of the Commission's new rules departed from those proposed by the cable/broadcast industry agreement. The Commission adopted the rules only on a temporary basis and ordained an automatic "sunset" of all must-carry regulation after five years,[21] although it resolved to initiate a rulemaking prior to that time to consider situations where mandatory carriage rules might continue to be necessary. (Jt. App., 110a.) Further, carriage of at least one or two public television stations was non-discretionary,[22] and new commercial stations were held exempt from the viewership standard for their first year of operation in order to permit them to establish an au-

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with between 21 and 27 usable activated channels were required to devote seven of those channels to must-carry signals. *Id.*

[17] 47 C.F.R. § 76.5(kk) (Jt. App., 178a). Further, a cable system was not required to carry any station if such carriage would subject the system to payment of distant signal copyright fees. *See* 47 C.F.R. § 76.56(c)(2) (Jt.App., 181a).

[18] 47 C.F.R. § 76.56(c)(3) (Jt. App., 181a).

[19] 47 C.F.R. § 76.5(d)(1)(ii) (Jt. App., 177a).

[20] 47 C.F.R. § 76.56(b) (Jt. App., 180a).

[21] The expiration date of the must-carry rules was to be June 10, 1992. *See* Amendment of Part 76, FCC DA 87-1665, rel. Nov. 23, 1987 (Erratum).

[22] 47 C.F.R. § 76.56(a)(1), (b) (Jt. App., 180a-81a).

dience base.[23] Finally, the Commission adopted "input selector switch" and "consumer education" provisions which required cable systems, *inter alia*, to inform their subscribers how to view broadcast signals that were not carried on the system by installing and using an "input selector" or "A/B" switch. Cable operators were required to offer to sell and/or install such a switch at the subscriber's expense.[24]

In response to the apparent holding of the court of appeals that broadcast localism had ceased to constitute a substantial governmental interest on the facts in *Quincy*, the Commission, while adhering to its former view that the must-carry regime "contributes toward [those] statutory goals" (Jt. App., 95a), justified the new, temporary rules as necessary to promote "the governmental interest in maximizing diversity of program choices and in fostering competition among program sources." (Jt. App., 148a-49a.) The Commission found that the must-carry rules were necessary on an interim basis to "ensure that broadcasting has a fair opportunity to compete with cable." (Jt. App., 147a.)

At the same time, the Commission accepted the view that installing an inexpensive A/B switch would give cable subscribers full and direct access to over-the-air broadcast signals. The fact that cable subscribers do not believe they have that capability, the Commission held, is only a "misperception" of cable's technological possibilities. (Jt. App., 105a.) The Commission recognized that it would take a considerable period of time to educate cable subscribers and to provide them a sufficient opportunity to acquire the A/B switch capability. (Jt. App., 109a.) Accordingly, the Commission ruled that the new must-carry rules would

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[23] 47 C.F.R. § 76.5(d)(1)(ii) (Jt. App., 177a).

[24] 47 C.F.R. §§ 76.66, 76.70 (Jt. App., 185a-87a, 316a-19a & 320a-21a).

be necessary only "until it can be assured that viewers have the knowledge and capability to receive off-the-air signals not carried on cable," and that such assurance could be reasonably assumed in a period of five years. (Jt. App., 147a.)

Although the principal cable television industry associations did not petition for review of the Commission's new must-carry rules,[25] a group of cable television companies and a cable television investor filed such petitions on First Amendment grounds. One broadcaster appealed on the ground that the rules were too narrow.

The court of appeals reviewed the Commission's decision under 47 U.S.C. § 402(a) and 28 U.S.C. § 2344 in *Century Communications Corporation v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) ("*Century*") (Jt. App., 1a-28a). Again purporting to use the *O'Brien* test, the court in *Century* rejected the Commission's reasoning, found the evidence supporting the new must-carry rules to be unconvincing, and struck down those rules as violative of cable operators' First Amendment rights.[26] The *Century* court seized upon the Commission's new rationale for the must-carry regime and found that such a rationale, as it did the Commission's previous one of promoting broadcast localism, was not a substantial and important governmental interest. (Jt. App., 18a-26a.) It held that the substantial deference normally accorded to the Commission's expert judgment has "little relevance when first amendment interests are even incidentally at stake" (Jt. App., 16a), and held that the Commission had not met its burden to adduce "substantial evidence" (Jt. App., 18a) to prove that the asserted governmental interest was substantial or that the new must-

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[25] The National Cable Television Association, *et al.* ("NCTA"), intervened but did not file a brief on the merits.

[26] Upon a request by the Commission, the court issued an Order (Jt. App., 29a-31a) clarifying that its decision left the Commission's input selector switch and consumer education requirements in place.

carry rules were narrowly tailored to serve that interest. As in *Quincy*, the court rejected the Commission's decision on the ground that "the need for a new saga of must-carry rules is more speculative than real." (Jt. App., 18a.)

Although the *Century* court sought to characterize its decision as a "narrow one" and disclaimed any interpretation of its decision as rendering must-carry rules *per se* unconstitutional, (Jt. App., 28a), the court's opinion gave no reason for confidence that any future rulemaking effort by the Commission could ever meet with court approval. The Chairman of the Commission recently expressed his belief that the Commission had done all it could to craft constitutional must-carry rules, thus casting considerable doubt upon whether the Commission will undertake to devise new must-carry rules.[27]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS ESSENTIALLY IN CONFLICT WITH DECISIONS OF THIS COURT AND IS IN DIRECT CONFLICT WITH A DECISION OF THE EIGHTH CIRCUIT

The decision below virtually ignores and is in derogation of several decisions of this Court upholding the broad authority and duty of the Commission to regulate the carriage of television broadcast signals by cable television systems, including mandatory carriage of local television signals. Moreover, the decision below is in direct conflict with a decision of another circuit and numerous decisions of this Court approving the Commission's must-carry rules.

The *Quincy* and *Century* decisions are squarely contrary to the decision in *Black Hills*, where the court expressly held that an earlier version of the must-carry rules was

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[27] *See Communications Daily*, Dec. 14, 1987 at 1; *Broadcasting*, Feb. 8, 1988 at 111.

permissible under the First Amendment. Its ruling was based on "the crucial consideration . . . that [cable systems] use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service." 399 F.2d at 69. The rules upheld in *Black Hills* were, in essence, the same rules invalidated on First Amendment grounds in *Quincy*, and they were far more comprehensive and intrusive than the rules struck down in *Century*. It is undisputed that the court below used a more stringent First Amendment test than *Black Hills*, and this Court should grant certiorari to resolve the conflict between those decisions.

Apart from its inconsistency with *Black Hills*, the decision below is essentially in conflict with the decisions of this Court, which have approved the must-carry rules in an uninterrupted line of decisions dating from 1968. In *Southwestern*, this Court upheld the Commission's authority to regulate the carriage of television broadcast signals by cable systems. The Court stated

> "[t]he Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of [cable] systems." 392 U.S. at 177.

That holding, while based on statutory rather than constitutional grounds, specifically recognized the substantial governmental interest promoted by the Commission's regulation of cable television.

In *United States v. Midwest Video Corp.*, 406 U.S. 649, 659 n.17. (1972) (plurality) ("*Midwest*"), this Court went

further and recognized that *Black Hills* "correctly upheld" the must-carry rules. The Court stated that those rules were justified by the need " 'to promote maximum television service to all people of the United States . . . , both those who are cable viewers and those dependent on off-the-air service.' "[28]

In *Crisp*, this Court again discussed the must-carry rules at length. 467 U.S. at 701-03, 705-06. The Court stated that "[t]here can be little doubt that the comprehensive regulations developed over the past 20 years by the Commission to govern signal carriage by cable television systems reflect an important and substantial federal interest." *Id.* at 714. The Court emphasized that

> "[i]n crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers." *Id.*

The court of appeals discarded those rulings when it first invalidated the Commission's must-carry rules in *Quincy*. Contrary to this Court's consistent rulings, the court below found in *Quincy* that the rules did not reflect a substantial governmental interest. The court held that the Commission had "fall[en] far short" of proving "the

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[28] *Id.* at 666 (*quoting* CATV, 2 F.C.C.2d 725, 746 (1966)). As Chief Justice Burger wrote in his decisive concurring opinion, 406 U.S. at 676,

> "Those who exploit the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission."

substantiality of the interest served by the rules." 768 F.2d at 1457. Indeed, the court of appeals went further to make a distinction—one never made by this Court for must-carry purposes—between Commission protection of local broadcast*ing* and Commission protection of local broadcast*ers*. *Id.* at 1460. Holding that the Commission's only legitimate objective was the protection of local broadcast*ing*, the *Quincy* court opined that it was not necessary for all local television signals to be carried by cable systems in order to serve "the asserted interest of assuring an adequate amount of local broadcasting in the community." *Id.* at 1463. Thus, while paying lip service to *Southwestern*'s recognition "that the elimination of local service is a 'matter of real and immediate public concern,' "[29] the court in *Quincy* eliminated 20 years of Commission must-carry regulation which, as this Court repeatedly recognized, served that fundamental objective.

The court in *Century* confirmed *Quincy*'s holding that the Commission's must-carry rules did not promote a substantial governmental interest. It embraced *Quincy*'s most extreme language, declaring unequivocally that must-carry regulation based on the need to "safeguard the diverse programming generated by protecting local broadcasts . . . was foreclosed by *Quincy Cable TV* . . . ." (Jt. App., 16a n.4.)[30] The court went on to reject the Commission's new

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[29] *Id.* at 1454 n.43 (*quoting Southwestern*, 392 U.S. at 173 & n.38).

[30] The *Quincy* court had said that it is "critical" that must-carry rules "seek to protect local broadcast*ing* and not local broadcast*ers*," and that the purpose of the Communications Act is not to protect a licensee against competition but to protect the public. 768 F.2d at 1460 (emphasis in original). Agreeing that the Act was not intended to protect a licensee against competition, broadcasters argued that mandatory carriage of local stations is needed to assure competition among television broadcast stations and to assure competition between those broadcast stations and cable systems. The public interest in broadcast*ing*, which exists concretely only in the form of broadcast*ers*, is thus served by must-carry rules.

must-carry regime, which was substantially limited both in scope and duration, on the ground that the Commission, again, had "not demonstrated that the new must-carry rules further a substantial governmental interest . . . ." (Jt. App., 26a.)

Thus, despite this Court's articulation of the important and substantial federal interest in mandating carriage of local television signals in *Southwestern*, and its reaffirmation only four years ago in *Crisp* that "[t]here can be little doubt" of the substantiality of that interest, 467 U.S. at 714, the court of appeals struck down two sets of must-carry rules on a finding that no such interest exists. This Court should grant certiorari to reassert and clarify the Commission's now uncertain authority to adopt regulations governing cable television carriage of broadcast signals.

II. THE DECISION BELOW PRESENTS IMPORTANT CONSTITUTIONAL AND STATUTORY ISSUES WHICH THIS COURT SHOULD RESOLVE

A. This Court Should Grant Certiorari To Determine Whether The Court Below Was Correct In Its Application Of The *O'Brien* Test And In Rejecting The Expert Judgments Of The FCC

The court of appeals had doubts as to the propriety of using the *O'Brien* standard rather than the more elevated First Amendment test of *Miami Herald*. The result was that it applied a heightened form of *O'Brien* scrutiny that was close to being the functional equivalent of *Miami Herald*. Never has this Court subjected an "incidental" burden on speech to such intense scrutiny, or required it to have such an exacting empirical basis, as did the court of appeals in striking down the must-carry rules in *Quincy* and *Century*.[31]

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[31] Unlike newspapers, cable television has enjoyed no tradition of freedom from federal regulation. To the contrary, various aspects of cable operations have long been subject to regulation by the Commis-

When the *Quincy* court struck down the original, comprehensive must-carry rules, it offered an olive branch by inviting the Commission to seek to "recraft the rules in a manner more sensitive to the First Amendment . . . ." 768 F.2d at 1463. The court assured the Commission that if the agency "move[d] beyond its 'more or less intuitive model' . . . we would be extremely hesitant to second-guess its expert judgment." *Id.* at 1459. In response, the Commission compiled a voluminous rulemaking record and, on the basis of record evidence, fashioned far narrower, less intrusive must-carry rules to satisfy the court's First Amendment concerns. This evidence included showings that some cable systems had ceased to carry local stations and/or demanded payments in return for carriage;[32] studies which showed that virtually no cable subscribers engaged in the practice or even possessed the capability of switching between cable and off-the-air broadcast reception (Jt. App., 49a-66a); and the statistical fact that cable systems "affect almost one-half of the potential audience for broadcast television service in communities nationwide" (Jt. App., 100a). Based on this record, the Commission held

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sion, *see* 47 C.F.R. Part 76, and by Congress, *see* Cable Communications Policy Act of 1984, *supra* at 6. In the 1984 Cable Act, Congress mandated, *inter alia*, that cable systems set aside access channels for both public and commercial use, *see* 47 U.S.C. §§ 611-12, devoting a substantial amount of the legislative history of the Cable Act to explaining its view that such requirements are consistent with and indeed promote the First Amendment. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 31-36 (1984).

[32] Public television interests cited 185 cases of public stations being dropped by cable systems serving 3.2 million people. *See* Opposition of Corporation for Public Broadcasting, *et al.*, filed Feb. 17, 1987 at 11 n.12. INTV's Comments in the same proceeding cited numerous examples of anticompetitive deletions of local signals by cable systems, including several where the stated purpose of the deletion was to rid the cable operator of a competitor for local advertising revenues or to persuade advertisers to patronize the cable system instead of a station that would not be seen by the system's subscribers. *See* INTV Comments, filed Jan. 29, 1986 at 59-67.

that the new rules were "necessary as interim measures to preserve the availability of the program choices to consumers, including broadcasters, and to ensure that broadcasting has a fair opportunity to compete with cable . . . ." (Jt. App., 147a.)

It is undisputed that the new rules were tailored closely to the concerns expressed by the *Quincy* court. For example, while *Quincy* found "especially troubling" that the prior rules drew "no distinction between cable systems that carry 100 signals and those that carry 12,"[33] the new rules provided that cable systems with limited channel capacity (*i.e.*, fewer than 21 channels) were free of any must-carry obligations. Moreover, the Commission generally did not require larger systems to devote more than 25 percent of their channels to local broadcast signals. (Jt. App., 180a.) Thus, the typical cable system of 54 channels would have absolute discretion over at least 40 of those channels.

Another example is the *Quincy* court's objection that the previous rules required cable systems to carry signals regardless of their importance to local broadcasting in the community and even when they showed duplicative programming. 768 F.2d at 1460. Under the Commission's post-*Quincy* rules, cable systems were required to carry only stations with demonstrated popularity in the community, and they were not required to carry duplicative programming. *See supra* at 9. Thus, the Commission conscientiously tried to craft new rules in response to *Quincy* which preserved at least a substantial part of local broadcasting without the "undifferentiated sweep" of its previous rules, *id.* at 1461.

The decision below shows the hollowness of the *Quincy* court's purported guidance to the Commission. Where *Quincy* stated that the court of appeals would be "extremely hesitant to second-guess [the Commission's] expert

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[33] 768 F.2d at 1462 n.55; *see also id.* at 1451-52, 1460.

judgment," the court in *Century* noted peremptorily that deference to the agency's expert judgment "has little relevance when first amendment freedoms are even incidentally at stake." (Jt. App., 16a.) In fact, the court completely disregarded the Commission's expert judgment—and the record supporting it—in holding that must-carry rules are not needed to prevent cable systems from dropping local broadcast signals.

The Commission found that while cable systems did not jettison all or even most of the broadcast signals they carried,"there is evidence in the record that some cable systems have ceased to carry individual broadcast stations, refused to carry new stations, and/or requested payment for carriage of stations." (Jt. App., 104a.) In the Commission's judgment, that conduct supported its decision to retain a limited version of the must-carry rules, particularly since the previous must-carry rules had been in abeyance for only a short time, and since cable systems had been told to avoid the widespread dropping of signals while the Commission's rulemaking was still in progress. *Id.*

In the guise of applying the *O'Brien* test, the court of appeals in *Century* rejected the Commission's rationale on the ground that the existing evidence was insufficient to prove with certainty that cable systems would actually drop broadcast signals in the absence of must-carry rules. (Jt. App., 25a-26a.) The court seized upon the fact that many cable systems had not dropped local signals in the aftermath of *Quincy* and downplayed the extent to which that behavior was affected by the Commission's pending rulemaking proceeding to consider new must-carry rules. The court particularly relied upon the positions of the Federal Trade Commission and the Department of Justice that the must-carry rules were not necessary. *Id.* The court below held the Commission to a "substantial evidence" test even when making the threshold determination of whether

the governmental interest is important (Jt. App., 18a),[34] all the while giving no deference to the Commission's expert evaluation of the record evidence.

These crucial conclusions of the court of appeals are irreconcilable with the decisions of this Court applying the *O'Brien* test. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (*"Clark"*), this Court upheld the National Park Service's prohibition on sleeping in public parks as a reasonable time, place or manner restriction. The Court noted that

> "[i]f the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment . . . ." *Id.* at 297.

The court below simply ignored that holding. As this Court has recognized on numerous occasions, local broadcasting clearly is "exposed" to more harm without must-carry rules than with them. Just as the *Clark* Court held that *O'Brien* does not "endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be maintained," *id.* at 299, neither does *O'Brien* permit courts to determine what measures are or are not necessary to preserve our system of local broadcasting in the United States.

In *United States v. Albertini*, 472 U.S. 675 (1985) (*"Albertini"*), involving the constitutionality of military bar orders, this Court did not require proof that the harm to

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[34] The court's use of the "substantial evidence" test was contrary to the well-established rule that informal rulemaking, such as the Commission's must-carry rulemaking, is governed only by the more lenient arbitrary and capricious standard. *See* FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 803 (1978).

be prevented would necessarily occur without the challenged regulation. The Court held that,

> "[n]othing in the First Amendment requires military commanders to wait until persons subject to a valid bar order have entered a military base to see if they will conduct themselves properly during an open house." 472 U.S. at 675.

Similarly, *O'Brien* does not require the Commission to wait until local broadcasting has actually suffered widespread injury, which the *Century* court required as proof of a substantial governmental interest, before acting to prevent the harm. Indeed, the original must-carry rules were premised on the Commission's judgment not to wait for the "bodies to pile up" before acting to address the problem.[35]

The *Clark* and *Albertini* decisions are consistent with the general rule established by this Court (and applied in FCC cases) that the predictive judgments of an expert agency are entitled to substantial judicial deference, particularly where "complete factual support in the record for the Commission's judgment or prediction is not possible."[36] This Court has consistently held that the Commission may regulate cable television to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[37] Congress created the Commission to be the "single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication," and it "therefore gave the Commission a comprehensive

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[35] CATV First Report and Order, 38 F.C.C. at 701. *See supra* note 32.

[36] FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978); *see also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 594-96 (1981).

[37] *Southwestern*, 392 U.S. at 178; *Midwest*, 406 U.S. at 649.

mandate with not niggardly but expansive powers."[38] More specifically, Congress expressly retained the FCC must-carry rules when it prohibited other forms of regulation in the 1984 Cable Act. *See supra* at 6.

With particular reference to the must-carry rules, this Court in *Southwestern* observed that the Commission "could not predict with certainty the consequences of unregulated CATV," but nevertheless approved the Commission's judgment that "its statutory responsibilities demand that it 'plan in advance of foreseeable events, instead of waiting to react to them.' "[39] The Commission has never before been held to the "heavy burden"[40] of affirmatively proving what will happen to the nation's system of free, locally oriented television in the future if all regulation of television signal carriage by cable systems were removed, nor has the Court found that the Commission's judgments could be undercut by less expert agencies.

The burden placed on the Commission by the court of appeals under the *O'Brien* test—to prove positively that widespread serious injury to free local broadcasting will occur to a certainty if the regulatory checks in place to prevent such injury are removed—is an impossible one to meet. Indeed, the Chairman of the Commission recently interpreted *Quincy* and *Century* to require the Commission to produce evidence showing that must-carry rules are necessary to prevent substantial harm to "the industry generally" before the Commission may regulate cable signal carriage. *See supra* note 27. Given the court's unequivocal rejection of the sharply-limited interim rules in *Cen-*

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[38] *Southwestern*, 392 U.S. at 168, 173; *Midwest*, 406 U.S. at 660, 661 (footnotes and citations omitted).

[39] 392 U.S. at 176-77 (*quoting* CATV First Report and Order, 38 F.C.C. at 701).

[40] *Quincy*, 768 F.2d at 1462.

tury, its application of the *O'Brien* test is not just a hurdle to be overcome, it is a stone wall.

B. The *Quincy* And *Century* Decisions Have Induced The Commission To Abandon The Public Interest Rationale For The Must-Carry Rules Which Has Been Approved By This Court In Several Decisions

It is apparent that *Quincy* misled the Commission into altering its rationale for must-carry rules from one which this Court had consistently approved to the weaker, substitute rationale that was rejected by the court below. In evident response to *Quincy*, the Commission's rationale for more limited post-*Quincy* rules did not rely on the statutory provisions mandating that the Commission foster and maximize locally oriented, free broadcast television services. Instead, while the Commission briefly alluded to Sections 1, 303 and 307(b) of the Communications Act and stated that its new regulatory scheme "contributes to [these] statutory goals" (Jt. App., 95a), the agency stated that its "assessment of the federal interest . . . is different from that relied upon by the Commission, i.e. Section 307(b), in initially adopting the former must carry rules." (Jt. App., 96a-97a.)[41]

Having abandoned the bedrock rationale for must-carry rules repeatedly endorsed by this Court, the Commission was left to justify its revised rules on the amorphous substitute rationale of "the governmental interest in maximizing diversity of program choices and in fostering competition among program sources." (Jt. App., 148a-49a.)

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[41] Thereafter, the Chairman of the Commission wrote to congressional committee chairmen: "With respect to the Commission's 'failure' to rely upon the concepts of localism and Section 307(b), I must point out that these two theories *did*, in fact, form the basis of the Commission's original must-carry rules. But [*Quincy*] makes clear that the desire to protect local broadcast*ing* alone does not justify must-carry" (first emphasis in original; second emphasis supplied). Letter From FCC Chairman Dennis Patrick to the Honorable John D. Dingell, Chairman, House Committee on Energy and Commerce, dated Feb. 23, 1988.

The Commission's long-term vehicle for achieving such diversity and competition after a five-year period of limited must-carry rules was the A/B switch which the Commission had only two years previously and for 20 years prior to *Quincy* steadfastly adjudged inadequate to assure cable subscribers effective access to local broadcast signals.[42] However, the A/B switch had been elevated as a solution by the *Quincy* court, which based its invalidation of the prior must-carry rules in substantial part on the supposed availability of such a simple and effective switch.[43]

In response, the Commission not only reversed its long-held view of A/B switches, but made the A/B switch the cornerstone of its new regulatory program. In so doing, the Commission frankly acknowledged the influence of *Quincy* (Jt. App., 127a). On reconsideration, the Commission held fast to its new-found faith in A/B switches to equalize competition between cable and local broadcasting. The Commission disregarded the fact that the cable industry's principal trade associations and numerous cable system operators, which previously had championed the switches as obviating the need for must-carry rules, now shunned this solution, joined broadcasters in preferring must-carry rules to A/B switches, and filed voluminous studies which persuasively demonstrated numerous serious deficiencies in the switch. (Jt. App., 211a-15a.)[44] Unfazed

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[42] *See, e.g.*, Cable Television Mandatory Signal Carriage Rules, 55 Rad. Reg. 2d (P&F) 1365, 1367 (1984) ("It is contended that the existence of an A/B switch would be a satisfactory substitute for the mandatory carriage rules . . . . Our extensive experience . . . suggests otherwise; even relatively minor receiver/tuner obstacles to reception may create significant impediments to viewing of stations and thus have substantial impact on their economic viability"); CATV First Report and Order, 38 F.C.C. at 702 ("the sheer inconvenience of switching is an obvious deterrent to its use by the subscriber").

[43] *See* 768 F.2d at 1441, 1452-53, 1457 n.48.

[44] *See* Joint Petition for Reconsideration of NCTA, Community Antenna Television Association and National Association of Broadcasters

by the damning testimony concerning the inadequacy of A/B switches from both sides of the controversy,[45] the Commission noted again that the switch "was part of the *Quincy* court's findings," stated that the A/B switch problems cited by the industries were "much overstated," and affirmed its reliance on switches alone to assure even-handed competition between broadcasting and cable after the sunset of the limited remaining must-carry requirements in 1992. (Jt. App., 233a-37a.)

While the Commission's conversion regarding the A/B switch was clearly designed to satisfy *Quincy*, the attempt backfired. The *Century* court accepted uncritically the Commission's new faith in the switch and held that the Commission was unjustified in reinstituting even a limited and temporary must-carry rule. The court overlooked or disregarded the fact that the cable industry, which had convinced the *Quincy* court that the switch removed the need for must-carry regulation, had since repudiated the switch and presented evidence of its patent defects and inadequacies. These matters were brought to the court's attention most forcefully in the briefs of intervenors.[46]

("NAB") (with attached NCTA Engineering Committee Report), filed Dec. 17, 1986. The NCTA report found (at 20) that the switches are notoriously prone to mechanical failure, corrode rapidly, yield a seriously degraded signal quality and noticeable interference due to inadequate "isolation" (*i.e.*, separation of the cable signal input for the off-air signal input), and concluded that dependence on switches are "certain to lead to frustration, confusion and dissatisfaction on the part of viewers." *See also* Petition for Reconsideration of Adelphia Communications, *et al.*, filed Jan. 12, 1987 (*discussed in* Jt. App., 215a-17a); Petition for Reconsideration of Gill Industries, Inc., filed Jan. 12, 1987.

[45] *See also, e.g.*, Comments of NAB, filed Jan. 29, 1986; Comments of INTV, filed Jan. 29, 1986; Comments of Television Operators Caucus, filed Jan. 29, 1986.

[46] *See* Brief and Reply Brief of Intervenor Office of Communication of the United Church of Christ, No. 86-1683, filed July 20,1987 and Sept. 11, 1987, respectively, (D.C. Cir.). *See also* Brief of NAB and INTV, No. 86-1683, filed Aug. 25, 1987 (D.C. Cir.) at 2 n.2, 5 & n.5, 24 & n.19.

The inadequacy of A/B switches, and the judicial pressure that led the Commission to rely upon them, are especially crucial because cable operators are intra-modal monopolies in almost every community in the nation. As such, these monopoly cable operators are "gatekeepers" of over-the-air television signals for their subscribers. *See supra* note 3. Typically the cable installer or the subscriber removes any external antenna for off-air broadcast reception when the cable is connected to the subscriber's television receiver. Consequently, unless (1) cable subscribers maintain and reconnect their VHF and UHF off-air antennae or purchase new antennae, (2) they also purchase A/B switches to alternate between cable and antenna-assisted off-air reception, *and* (3) the switches actually work reliably, efficiently and without inconvenience to the subscriber to restore unimpeded broadcast station reception, subscribers will have inadequate access to local broadcast television news, information and entertainment programming which the gatekeeper cable operator, acting in its own economic self-interest, chooses not to carry. Indeed, many consumers who subscribe to cable in order to gain satisfactory reception of local signals will not be able to achieve such reception even with an effective switch.[47]

As a practical matter, absence of carriage of a television station on a cable system is tantamount to non-reception of that station by subscribers of the cable system. And with cable television now serving more than half of the nation's total television households,[48] it is clear that such non-carriage would be devastating and often lethal to a local advertiser supported station's audience and advertising revenue base, or to a local educational station's audience and contributor base.

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[47] *See supra* at 17; *see also* Affidavit of Muriel Henle Reis, *submitted with* Response to Petition for Rehearing, filed by INTV and NAB on March 3, 1988 in Nos. 86-1683, *et al.* (D.C. Cir.).

[48] *See Communications Daily*, Nov. 25, 1987 at 7.

It is equally clear that cable operators have direct economic incentives to favor carriage of specialized cable program services, on which they sell local advertising spots,[49] and disfavor carriage of local free television stations (or relegate their carriage to channel positions distant from those of other popular program services), inasmuch as the local stations are seen as competitors for local advertising dollars.[50] Importantly, many of the nation's largest cable conglomerates own all or part of these cable services, and so have a natural and overriding proprietary interest in maximizing viewership of these services as against local broadcast services.[51]

The situation today is one of total regulatory impotence, resulting from a bizarre case of the court of appeals and the Commission misdirecting each other—the court by indicating in *Quincy* (and declaring outright in *Century*) that must-carry rules based on the statutory goal of fostering and maximizing free, local broadcasting service are "foreclosed" to the agency (Jt. App., 16a n.4); the Commission

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[49] *See, e.g., New York Times*, Feb. 17, 1988 at D18 (describing increases in cable advertising, local commercial insertions in program services).

[50] *See* discussion *supra* at note 32. As one cable operator explained his deletion of a local station: "Of course, as an advertising medium, we are competitors with WTGS. And as a business, it doesn't make sense to subsidize a competitor if you don't have to." INTV Comments at 60, *quoting Island Packet* (Hilton Head, S.C.), Aug. 30, 1985, p. 2-C. *See also, e.g., Multichannel News*, Feb. 17, 1986 at 1 ("once cable penetration exceeds 60 percent in a market, then the cable system can compete on an equal footing with local independent stations, . . . 'with no FCC license to worry about, no transmitter . . . without all those things that go with an FCC license.' "); *Multichannel News*, April 14, 1986 at 43 (cable operator-owned channel "could compete for ad dollars very effectively with local broadcast stations, particularly if those stations are denied carriage on the cable system or are relegated to less attractive channel positions at the high end of the dial").

[51] *See Broadcasting*, Feb 29, 1988 at 41. *See also Multichannel News*, Oct. 20, 1986 at 28A; *Communications Daily*, Nov. 10, 1986 at 3.

by responding to its constricted options with a tortured rationale built around the *Quincy*-approved A/B switch, which, according to all but the agency and the switch manufacturers,[52] is woefully unsuited to its assigned task; and the court again, by using the Commission's forced conversion to the dubious virtues of the A/B switch to invalidate the remaining must-carry element of the agency's regulatory policy. Now, even as the Commission continues to grapple with the increasingly evident fact that the A/B switch is wholly inadequate as a substitute for signal carriage requirements,[53] the agency is reluctant to try yet again to fashion a rule that will satisfy the prohibitive standards of the court of appeals.

Accordingly, this case presents an exceptionally important question of federal statutory and constitutional law which should be answered by this Court, lest the Commission neglect its congressionally mandated responsibility to preserve and foster the growth of free broadcast service and to assure a fair distribution of broadcast stations to communities across the nation.

C. The Court Below Ignored the Interrelationship Between Commission Signal Carriage Rules and the Federal Copyright Scheme for Carriage of Such Signals

The court's invalidation of the must-carry regulations involves another statutory conflict. The operation of those rules was an integral part of the predicate for the compulsory copyright license that Congress has bestowed on cable television retransmissions of television broadcast sig-

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[52] *See* Jt. App., 230a-31a, 235a-36a (*citing* comments of A/B switch manufacturer Pico Macom, Inc., filed Jan. 21, 1987).

[53] The increasing uncertainty over the technical viability of A/B switches led the Commission to stay implementation of its previous adoption of technical standards for such switches. *See* Amendment of Part 15 of the Commission's Rules, FCC 88-27, Gen. Docket No. 87-107, rel. Jan. 28, 1988 (Order Granting Stay Request).

nals in the Copyright Revision Act of 1976.[54] Under Section 111 of the 1976 Act, 17 U.S.C. § 111 (App. A2-19), cable systems are entitled to retransmit an unlimited number of local television broadcast signals at no cost, while paying low, statutorily prescribed royalties into the U.S. Copyright Office for the right to carry distant television signals. Thus, cable operators are totally insulated from marketplace negotiation, with an absolute, government-guaranteed right to exhibit the entire inventory of programs shown on television broadcast stations anywhere.

As early as 1970, the Commission recommended that Congress "adopt a provision that a CATV system shall have a compulsory license for such signals as the Commission, by rule or order, may authorize the system to carry."[55] In late 1971, the broadcasting, cable television and program supply industries submitted to the Commission their negotiated agreement to an overall regulatory scheme for cable that included must-carry rules and support for cable copyright legislation establishing a compulsory license for cable system retransmissions of broadcast signals. The importance of the latter element and its interrelationship with the Commission's regulatory program for cable was emphasized by the Commission in incorporating the agreement without change in its comprehensive cable television regulations issued in 1972.[56]

Now, post-*Century*, cable systems enjoy the enormous government-bestowed benefit of carrying unlimited amounts

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[54] Pub. Law No. 94-553, 90 Stat. 2541.

[55] Letter from FCC Chairman Dean Burch to Senators Warren G. Magnuson, Chairman, Senate Commerce Committee, and John O.Pastore, Chairman, Senate Subcommittee on Communications, dated March 11, 1970.

[56] *See* Cable Television Report and Order, 36 F.C.C.2d 143, 166 (1972), *aff'd sub nom.* ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975). *See also id.* at 147, 165-66, 260, 284-286.

of broadcast programming without the intended corresponding obligation to carry the locally-oriented free programming exhibited by local stations.[57] Absent must-carry rules, cable systems can effectively cut off the audience of some local television stations by carrying only those stations which they believe their subscribers will insist upon as a condition of maintaining their subscriptions, while refusing to carry those commercial and public television stations whose absence from the cable system will not drive subscribers to cancel their subscriptions. Absent review by this Court, the Commission's statutory mandate to determine the proper allocation of television broadcast signals in local communities nationwide thus will pass from the agency to cable operators acting as gatekeepers of all television programming entering cabled homes.

CONCLUSION

INTV respectfully submits that this Court should grant a writ of certiorari to resolve the decisional conflicts and the important questions of federal constitutional and statutory law set forth herein.

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[57] The *Quincy* decision summarily rejected the notion that must-carry regulation was integrally related to cable's compulsory license to retransmit local station signals without compensation to the stations which must themselves negotiate and pay for their programming in the marketplace. Instead, the court found that the must-carry rules were merely "a convenient reference point [in the Copyright Act] for determining where a local signal ends and a distant signal begins." 768 F.2d at 1454 n.42. In light of the foregoing history, the court was clearly wrong.

Respectfully submitted,

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APPENDIX

The First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent provisions of the Communications Act of 1934, as amended, are as follows:

> Sec. 1. [47 U.S.C. § 151] For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.
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> Sec. 303(g) [47 U.S.C. § 303(g)] [The FCC shall have authority to] [s]tudy new uses for radio, provide for experimental uses of frequencies, and

generally encourage the larger and more effective use of radio in the public interest;

Sec. 303(h) [47 U.S.C. § 303(h)] [The FCC shall] [h]ave authority to establish areas or zones to be served by any station;

Sec. 303(s) [47 U.S.C. § 303(s)] [The FCC shall] [h]ave authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

Sec. 307(b) [47 U.S.C. § 307(b)] In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 111 of the Copyright Revision Act of 1976 (17 U.S.C. § 111) provides as follows:

(a) Certain Secondary Transmissions Exempted.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by

the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) The secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; or

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) Secondary Transmission of Primary Transmission to Controlled Group.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary

transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided*, however, That such secondary transmission is not actionable as an act of infringement if—

(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

(2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

(c) Secondary Transmissions by Cable Systems.—

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible un-

der the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the

particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmissions: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary

transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

(d) Compulsory License for Secondary Transmissions by Cable Systems.—

(1) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), prescribe by regulation—

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time

to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centrum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centrum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centrum of such gross receipts for each of the second,

third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centrum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraph (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centrum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic ser-

vice of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centrum of any gross receipts up to $80,000; and (ii) 1 per centrum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

(2) The Register of copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by paragraph (1) of this subsection.

(3) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television

program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(a); and

(C) any such owner whose work was included in nonnetwork programing consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(4) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such

controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(e) Nonsimultaneous Secondary Transmissions by Cable Systems.—

(1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, unless—

(A) the program on the videotape is transmitted no more than one time to the cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotape, including The commercials contained within such program, episode, or picture, is transmitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents unauthorized duplication while in the possession of the facility making the videotape for the system if the system owns or controls the facility, or takes reasonable precautions to prevent such duplication if it does not own or control the facility, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to clause (2), erases or destroys, or causes the erasure or destruction of, the videotape; and

(D) within forty-five days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to clause (2), to the erasure or destruction of all videotapes made or used during such quarter; and

(E) such owner or officer places or causes each such affidavit, and affidavits received pursuant to clause (2)(C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office; and

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations, and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the

transmission had been made simultaneously, except that this subclause shall not apply to inadvertent or accidental transmissions.

(2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, except that, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it, in accordance with clause (1), may be transferred by one cable system in Alaska to another system in Alaska, by one cable system in Hawaii permitted to make such nonsimultaneous transmissions to another such cable system in Hawaii, or by one cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands, to another cable system in any of those three territories, if—

(A) each such contract is available for public inspection in the offices of the cable systems involved, and a copy of such contract is filed, within thirty days after such contract is entered into, with the Copyright Office (which Office shall make each such contract available for public inspection); and

(B) the cable system to which the videotape is transferred complies with clause (1)(A), (B), (C)(i), (iii), and (iv), and (D) through (F); and

(C) such system provides a copy of the affidavit required to be made in accordance with clause (1)(D) to each cable system mak-

ing a previous nonsimultaneous transmission of the same videotape.

(3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agreement, or any such agreement hereafter entered into, between a cable system and a television broadcast station in the area in which the cable system is located, or a network with which such station is affiliated.

(4) As used in this subsection, the term "videotape", and each of its variant forms, means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station licensed by the Federal Communications Commission, regardless of the nature of the material objects, such as tapes or films, in which the reproduction is embodied.

(f) Definitions.—As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted. In the case of a low power television station, as defined by the rules and regulations of the Federal Communications Commission, the "local service area of a primary transmitter" comprises the area within 35 miles of the transmitter site, except that in the case of such a station located in a standard metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statis-

tical areas (based on the 1980 decennial census of population taken by the Secretary of Commerce), the number of miles shall be 2 miles.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however,* That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of a primary transmitter" in the case of a television broadcast

station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. The "local service area of a primary transmitter", in the case of a radio broadcast station, comprises the primary service area of such station pursuant to the rules and regulations of the Federal Communications Commission.

A "distant signal equivalent" is the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial educational station for the nonnetwork programing so carried pursuant to the rules, regulations, and authorizations of the Federal Communications Commission. The foregoing values for independent, network, and noncommercial educational stations are subject, however, to the following exceptions and limitations. Where the rules and regulations of the Federal Communications Commission require a cable system to omit the further transmission of a particular program and such rules and regulations also

permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, or where such rules and regulations in effect on the date of enactment of this Act permit a cable system, at its election, to effect such deletion and substitution of a non-live program or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no value shall be assigned for the substituted or additional program; where the rules, regulations, or authorizations of the Federal Communications Commission in effect on the date of enactment of this Act permit a cable system, at its election, to omit the further transmission of a particular program and such rules, regulations, or authorizations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, the value assigned for the substituted or additional program shall be, in the case of a live program, the value of one full distant signal equivalent multiplied by a fraction that has as its numerator the number of days in the year in which such substitution occurs and as its denominator the number of days in the year. In the case of a station carried pursuant to the late-night or specialty programing rules of the Federal Communications Commission, or a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry, the values for independent, network, and noncommercial educational stations set forth above, as

the case may be, shall be multiplied by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station.

A "network station" is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programing supplied by such networks for a substantial part of that station's typical broadcast day.

An "independent station" is a commercial television broadcast station other than a network station.

A "noncommercial educational station" is a television station that is a noncommercial educational broadcast station as defined in section 397 of title 47.

Section 624 of the Cable Communications Policy Act of 1984 [47 U.S.C. § 544] provides as follows:

(a) Regulation by franchising authority

Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system—

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not establish requirements for video programming or other information services; and

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise—

(A) for facilities and equipment, and

(B) for broad categories of video programming or other services.

(c) Enforcement authority respecting franchises effective under prior law

In the case of any franchise in effect on the effective date of this subchapter, the franchising authority may, subject to section 545 of this title, enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

(d) Cable service obscene, indecent or otherwise unprotected by Constitution

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2)(A) In order to restrict the viewing of programming which is obscene or indecent, upon

the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

(B) Subparagraph (A) shall take effect 180 days after the effective date of this subchapter.

(e) Technical standards

The Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.

(2) Paragraph (1) shall not apply to—

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this chapter; and

(B) any rule, regulation, or order under Title 17.